SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1903.

No. 563.

HENRY C. PETTIT, United States Marshal for the District of Indiana,

Appellant,

vs.

THOMAS WALSHE.

BRIEF FOR H. B. M. CONSUL-GENERAL AT NEW YORK, APPELLANT.

This is an appeal from an order of the Circuit Court of the United States, for the District of Indiana, granting to the appellee his petition for a writ of *habeas corpus* and discharging him from custody (Rec., p. 8), upon the ground that the warrant by virtue of which he was arrested, issued by a Commissioner in New York, in an extradition proceeding, and made returnable before the Commissioner in the City of New York, could not be executed in the District of Indiana, and that, in an extradition proceeding, the warrant must be made returnable within the District or State, wherein the fugitive is found. (Rec., pp. 10-11.)

The appellee was arrested at Indianapolis, in the District of Indiana, by the United States Marshal of that district, under a warrant issued by Commissioner John A. Shields, in the Southern District of New York, which warrant reads as follows:

> "The PRESIDENT of the United States to any Marshal of the United States, to th Deputies of any such Marshal, or any c either of them:
>
> WHEREAS, complaint has been made on oath under the Treaty between the United States and Her late Majesty, the Queen of Great Britain and Ireland, concluded and signed at Washington, on the 9th day of August, 1842, and of the Supplementary Treaty between the same High Contracting Parties, signed July 12th, 1889, before me, John A. Shields, one of the Commissioners appointed by the District Court of the United States for the Southern District of New York, and also a Commissioner appointed to execute the Act of Congress, entitled 'An Act for Giving Effect to Certain Treaty Stipulations between this and Foreign Governments, for the Apprehension and Delivery of Certain Offenders.' Approved August 12th, 1848, and of the several acts amendatory thereof; that heretofore and on or about the 15th day of July in the year 1895, at the General Assizes and General Gaol Delivery for the County of Mayo, in that part of the United Kingdom of Great Britain and Ireland, called Ireland, and within the jurisdiction of His said Britannic Majesty, held at Castlebar, in said County, before the Right

Honorable Mr. Justice Gibson, a Justice of said Court, one James Lynchehaun, was convicted of having on the 6th day of October, 1894, feloniously and unlawfully wounded one Agnes McDonnell with intent thereby then feloniously and of his malice aforethought, *her* the said Agnes McDonnell to kill and murder, and was by the said Court, sentenced to be kept in penal servitude for his natural life, and was thereafter, under and by virtue of said judgment and sentence of said Court committed to the Maryborough Convict Prison, in Queens County, in Ireland, and that on or about the 6th day of September in the year *1902*, before the said sentence had been executed, the said James Lynchehaun did escape from the said Maryborough Prison, and is now at large, and the said sentence of the said James Lynchehaun has never been executed; and that the said James Lynchehaun is a fugitive from the Justice of the Kingdom of Great Britain and Ireland, and is now within the territory of the United States of America, and that the said crime for which the said James Lynchehaun was so as aforesaid convicted and sentenced, is named and specified in the treaty between the United States and Great Britain.

NOW, THEREFORE, WE COMMAND YOU FORTHWITH, to take the said James Lynchehaun, and bring him before me, the said Commissioner, at my office, Room 78, in the P. O. Building in the City of New York, in order that the evidence of the criminality of the said James Lynchehaun may be heard and considered and if deemed sufficient to sustain the charge that the same may be certified, together with a copy of all the proceedings to the Secretary

of State, that a warrant may issue for his surrender pursuant to said treaty.

Witness my hand and official seal this 6th day of June, in the year 1903.

[Seal.] *John A. Shields.*

U. S. Commissioner for the Southern District of New York, and Commissioner duly authorized *by* the District Court of the United States for the Southern District of New York to act as Commissioner under the Laws of the United States concerning the extradition of fugitives from the justice of a foreign Government under a treaty or convention between This and any Foreign Government."

The copy in the record (p. 5) is not an exact copy. The differences are italicized; the appellant has the original present, for reference, upon the argument.

After his arrest, the appellee presented his petition to the Circuit Court of the United States for the District of Indiana, for a writ of *habeas corpus* and discharge from custody (Rec., p. 2); the portions of which, material to this appeal, are as follows:

"That he is now imprisoned and restrained of his liberty by Henry C. Pettit, marshal of the United States for the District of Indiana, at the Marion County jail, of the city of Indianapolis, in said District.

That your petitioner is thus imprisoned and held in custody under color of the authority

of the Constitution and laws of the United States, relating to the return of fugitives from justice to foreign countries with which the United States has concluded treaties of extradition.

That said Henry C. Pettit, asserts that he has the right to hold in custody and imprison your petitioner under and by virtue of a certain warrant of arrest issued by one John A. Shields, said to be a United States commissioner appointed by the District Court of the United States for the Southern District of New York, and also a commissioner to execute the act of Congress entitled, 'An Act for giving effect to certain treaty stipulations between this and foreign Governments, for the apprehension and delivery of certain offenders,' approved August 12, 1848, and the several acts amendatory thereof, of which warrant a true copy is hereto attached marked 'Exhibit A.'

That said imprisonment is illegal and in violation of the Constitution and Laws of the United States for the following reasons:

FIRST.—It is asserted by the said marshal that said warrant is authorized by and issued under and pursuant to Section 5270 of the Revised Statutes of the United States, being Section I of the Act of August 12th, 1848, entitled, 'An Act for giving effect to certain treaty stipulations between this and foreign Governments for the apprehension and delivery of certain offenders,' as amended by the Act of June 6, 1900; whereas your petitioner shows and charges that the said warrant, being for the arrest and detention of a person alleged to have been convicted of a crime, is

not authorized by said statute, or any other statute or law of the United States.

SECOND.—That said warrant does not constitute authority by virtue of said statute, or any other law of the United States, for the arrest or detention elsewhere than in the Southern District of New York, of the person whose arrest and detention is thereby directed; whereas your petitioner was arrested thereunder and is detained in the District of Indiana, of which District he was, and still is, an inhabitant and resident.

THIRD.—That the said warrant does not constitute sufficient authority for the arrest and detention of the person whose arrest and detention is thereby ordered, by any other officer or person than the Marshal of the United States for the Southern District of New York, or a deputy or other person duly authorized by said Marshal.

Whereas, your petitioner was not arrested and is not detained thereunder by said Marshal, or any Deputy or other person authorized by him, but has been arrested and is detained thereunder by the said Marshal of the United States for the District of Indiana.

FOURTH.—That the said warrant orders that the person therein directed to be arrested be brought before said John A. Shields, commissioner, at his office, Room #78, in the Post-Office building in the City of New York, in order that evidence of criminality of said person may be heard and considered, etc. And the said Marshal of the United States for the District of Indiana, having arrested your

petitioner as the person directed to be arrested thereby, is holding your petitioner under arrest for the purpose of taking him out of the District of Indiana to said Southern District of New York.

Whereas, your petitioner being an inhabitant and resident of the District of Indiana, and having been arrested therein is entitled to have the questions of his identity with the person directed to be arrested by said warrant, and of his conviction of crime, as alleged in said warrant, and of his criminality heard and determined in said District of Indiana, before a Judge or United States Commissioner, or other Magistrate, having jurisdiction to hear and determine such matters within said district.

FIFTH.—That your petitioner is not James Lynchehaun, the person directed by said warrant to be arrested and detained."

The U. S. Marshal for the District of Indiana filed an answer by way of return to the petition (Rec., pp. 6-7), setting forth that as said marshal he had arrested and was holding in custody the appellee, under and by virtue and authority of a certain warrant, a true copy of which was annexed to the petition, and then set forth:

"That said warrant in due course came to hand for service as alleged in said petition on the 4th day of September, 1903, and was duly served upon petitioner on the 8th day of September, 1903, at Indianapolis, Indiana; that said warrant is regular, legal, valid, and sufficient in law in all respects to legally just-

ify and warrant the arrest and detention of petitioner, and, under the laws of the United States, it was and is the duty of this defendant to arrest and detain said petitioner, and deliver him as commanded by said writ for hearing before Commissioner Shields, in New York City; that said writ runs for service in the State of Indiana, although issued by a commissioner of the United States for the Southern District of New York by reason of its being a writ in extradition; that defendant is informed and believes, and therefore states the fact to be, that petitioner is the identical person commanded to be arrested by said warrant as James Lynchehaun; that a true and complete copy of said warrant is attached to petitioner's petition, marked 'A,' and made a part thereof, and that it is by virtue and authority solely of said warrant that defendant holds and detains petitioner; that defendant proposes, if not otherwise ordered by this Honorable Court, to obey, as United States Marshal for the District of Indiana, the command of said warrant as set out therein, believing it to be his duty as said officer so to do."

Exceptions were filed to this return by the appellee, that it did not set forth or show any matter sufficient in law to justify his imprisonment and detention, and that the matters set forth in the return did not traverse, or confess and avoid, the matters set forth in the petition. (Rec., pp. 7-8.)

After argument, the Circuit Court sustained the exceptions, and ordered that the prayer of the petition be granted, and that the appellee be discharged from custody. (Rec., p. 8.)

The one question determined by the Court, and as expressed by the Court, controlling, was "the "power of a commissioner in the Southern Dis- "trict of New York to issue a warrant, upon which "the Marshal of this District may lawfully arrest "the accused, and return him to the Court of the "Commissioner in New York," and the Court held that the power did not exist, stating the reasons in the opinion of the Court. (Rec., pp. 8-11.) Reported in 125 Fed. R., 572.

The following errors were assigned in support of the appeal: (Rec., p. 12.)

> "First.—The Court erred in sustaining the exceptions, and each of them, taken and filed to the return of said respondent, Henry C. Pettit, to said Writ of Habeas Corpus.
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> Second.—The Court erred in holding and deciding that a warrant for arrest in an extradition proceeding does not run, and may not be served, beyond the territorial limits of the District in which it is issued.
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> Third.—That the judgment of the Court that a warrant for arrest, issued by a United States Commissioner, in the State of New York, addressed to any United States Marshal, in any District of the United States, was not sufficient authority to authorize the respondent, Henry C. Pettit, to arrest and hold the said Thomas Walshe, whose true name was James Lynchehaun, and in ordering the discharge and release of the said prisoner, and in rendering judgment therefor, in said cause, was erroneous."

The question presented by this record is an important one in extradition proceedings, and changes the law settled by a decision rendered, upwards of thirty-five years ago, that a legal warrant in these proceedings, wherever issued in the United States, could be executed in any part of the United States, and followed in practice, in this class of cases, until the decision, now here for review.

This appellant urges in support of the errors assigned:

I.—That a warrant, wherever issued in the United States, by any of the Justices, Judges or Commissioners enumerated in Section 5270 of the Revised Statutes, for the apprehension of a fugitive criminal of a foreign Government, with whom the United States has a treaty or convention for extradition, can be executed in any State, District or Territory of the United States, and the fugitive brought before the Justice, Judge or Commissioner granting the warrant, at the place where issued or made returnable, by virtue of, and under, Section 5270.

II.—That the treaties of extradition, between the United States and Great Britain, do not make any provision for the execution of warrants, nor do they prescribe the limits of the territorial execution of a warrant to a State or District of the United States, but by Article VI of the treaty of 1889 with Great Britain, extradition of fugitives from the United States must be carried out in the

United States, in conformity with the laws regulating extradition for the time being in force therein.

III.—That the procedure, in extradition proceedings, is governed by the Federal laws, and that laws of the respective states of the United States have no relation to the question, except as necessary to define the crime, and determine whether, upon evidence similar to that introduced on behalf of the demanding government, the accused would have been committed for trial, had the crime been committed in the particular state where he is found.

IV.—That in the case of a fugitive convict, within the treaty, the local law can only be appealed to, to ascertain, whether the crime of which the fugitive has been convicted in the Kingdom of Great Britain and Ireland, is a crime in the particular State or Territory in which the fugitive is found.

TREATIES BETWEEN THE UNITED STATES AND GREAT BRITAIN.

ARTICLE X, OF THE TREATY OF 1842, 8 STAT. AT LARGE, 572, 576.

"It is agreed that the United States and Her Britannic Majesty shall, upon mutual requisitions by them, or their ministers, officers, or authorities, respectively made, deliver up to justice all persons who, being charged with the crime of murder, or assault with intent to commit murder, or piracy, or arson, or robbery or forgery, or the utterance of forged paper, committed within the jurisdiction of either, shall seek an asylum, or shall be found, within the territories of the other:

Provided, That this shall only be done upon such evidence or criminality as, according to the laws of the place where the fugitive or person so charged shall be found, would justify his apprehension and commitment for trial, if the crime or offense had there been committed; and the respective Judges and other magistrates of the two Governments shall have power, jurisdiction, and authority, upon complaint made under oath, to issue a warrant for the apprehension of the fugitive or person so charged, that he may be brought before such judges or other magistrates, respectively, to the end that the evidence of criminality may be heard and considered; and if, on such hearing, the evidence be deemed sufficient to sustain the charge, it shall be the duty of the examining Judge or magistrate to certify the same to the proper executive authority, that a warrant may issue for the surrender of such

fugitive. The expense of such apprehension and delivery shall be borne and defrayed by the party who makes the requisition and receives the fugitive."

ARTICLES I, VI AND VII OF THE TREATY OF 1889, 26 STATUTE-AT-LARGE, 1508.

ARTICLE I.

"The provisions of the said Xth Article are hereby made applicable to the following additional crimes:

1. Manslaughter, when voluntary.
2. Counterfeiting or altering money; uttering or bringing into circulation counterfeit or altered money.
3. Embezzlement; larceny; receiving any money, valuable security, or other property, knowing the same to have been embezzled, stolen, or fraudulently obtained.
4. Fraud by a bailee, banker, agent, factor, trustee, or director or member or officer of any Company, made criminal by the laws of both countries.
5. Perjury, or subornation of perjury.
6. Rape; abduction; child-stealing; kidnapping.
7. Burglary; house-breaking or shop-breaking.
8. Piracy by the law of nations.
9. Revolt, or conspiracy to revolt, by two or more persons on board a ship on the high seas, against the authority of the master; wrongfully sinking or destroying a vessel at sea, or attempting to do so, assaults on board a ship, on the high seas, with intent to do grievous bodily harm.

10. Crimes and offenses against the laws of both countries for the suppression of slavery and slave-trading.

Extradition is also to take place for participation in any of the crimes mentioned in this Convention or in the aforesaid Xth Article, provided such participation be punishable by the laws of both countries.

ARTICLE VI.

The extradition of fugitives, under the provisions of this Convention and of the said Xth Article, shall be carried out in Her Majesty's dominions and in the United States, respectively, in conformity with the laws regulating extradition for the time being in force in the surrendering State.

ARTICLE VII.

The provisions of the said Xth Article and of this Convention, shall apply to persons convicted of the crimes therein respectively named and specified, whose sentence therefor shall not have been executed.

In case of a fugitive criminal alleged to have been convicted of the crime for which his surrender is asked, a copy of the record of the conviction, and of the sentence of the Court before which such conviction took place, duly authenticated, shall be produced, together with the evidence proving that the prisoner is the person to whom such sentence refers."

LAWS OF THE UNITED STATES.

AUGUST 12, 1848, CHAPTER 167, 9 STATUTE-AT-LARGE, 302.

Sec. 1. That in all cases in which there now exists, or hereafter may exist, any treaty or convention for extradition between the government of the United States, and any foreign government, it shall and may be lawful for any of the justices of the Supreme Court or the judges of the several District Courts of the United States—and the judges of the several State courts, and the commissioners authorized so to do by any of the courts of the United States, are hereby severally vested with power, jurisdiction, and authority, upon complaint made under oath or affirmation, charging any person found within the limits of any State, district or territory, with having committed within the jurisdiction of any such foreign government any of the crimes enumerated or provided for by any such treaty or convention,—to issue his warrant for the apprehension of the person so charged, that he may be brought before said judge or commissioner, to the end that the evidence of criminality may be heard and considered; and if, on such hearing, the evidence be deemed sufficient by him to sustain the charge under the provisions of the proper treaty or convention, it shall be his duty to certify the same, together with a copy of all the testimony taken before him, to the Secretary of State, that a warrant may issue upon the requisition of the proper authorities of such foreign government, for the surrender of such person, according to the stipulations of said treaty or

convention; and it shall be the duty of the said judge or commissioner to issue his warrant for the commitment of the person so charged to the proper gaol, there to remain until such surrender shall be made.

Sec. 6. That it shall be lawful for the courts of the United States, or any of them, to authorize any person or persons to act as a commissioner or commissioners, under the provisions of this act; and the doings of such person or persons so authorized, in pursuance of any of the provisions aforesaid, shall be good and available to all intents and purposes whatever.

SECTION 5270 OF THE REVISED STATUTES, OMITTING THE AMENDMENT THERETO BY THE ACT OF JUNE 6, 1900, C. 793, 31 STATUTE-AT-LARGE, 656, WHICH APPLIES ONLY TO THE EXTRADITION OF FUGITIVE CRIMINALS FROM A FOREIGN COUNTRY OR TERRITORY OCCUPIED BY, OR UNDER THE CONTROL OF, THE UNITED STATES.

"Whenever there is a treaty or convention for extradition between the Government of the United States and any foreign government, any justice of the Supreme Court, circuit judge, district judge, commissioner authorized so to do by any of the courts of the United States, or judge of a court of record of general jurisdiction of any State, may, upon complaint made under oath, charging any person found within the limits of any State, district, or territory, with having committed within the jurisdiction of any such foreign government any of the crimes provided for by such treaty or convention, issue his warrant for the apprehension of the per-

son so charged, that he may be brought before such justice, judge, or commissioner, to the end that the evidence of criminality may be heard and considered. If, on such hearing, he deems the evidence sufficient to sustain the charge under the provisions of the proper treaty or convention, he shall certify the same, together with a copy of all the testimony taken before him, to the Secretary of State, that a warrant may issue upon the requisition of the proper authorities of such foreign government, for the surrender of such person, according to the stipulations of the treaty or convention; and he shall issue his warrant for the commitment of the person so charged to the proper jail, there to remain until such surrender shall be made."

POINTS.

I.

UPON THIS APPEAL, FROM A DECISION UPON THE APPLICATION FOR A WRIT OF *habeas corpus*, THIS COURT HAS THE POWER TO REVIEW THE DECISION BELOW, UPON THE FACTS, AS WELL AS THE LAW.

In re Neagle, 135 U. S., 142.
Horner v. *U. S., 143 U. S., 570.*

An order of a district or circuit court, of the United States, upon an application for a writ of

habeas corpus, can be reviewed only by an appeal, and not by a writ of error.

Rice v. *Ames, 180 U. S., 371.*
Re Morrissey, 137 id., 157, 158.
Re Neagle, supra.

The appeal lies directly to this Court, as the conconstruction of a treaty is drawn, in question.

Rice v. *Ames, supra.*

II.

THE WARRANT OF THE COMMISSIONER IN NEW YORK COULD LEGALLY BE EXECUTED IN INDIANAPOLIS, BY THE MARSHAL FOR THAT DISTRICT, AND THE APPELLEE BROUGHT BY THE MARSHAL, BEFORE THE COMMISSIONER IN NEW YORK FOR A HEARING.

The Act of August 12, 1848, 9 Stat. at Large 302, which was the first law of the United States establishing the procedure, as to the extradition of fugitives from the justices of a foreign country, under a treaty for extradition between the government of the United States and any foreign government, provided that

> "It shall and may be lawful for *any* of the justices of the Supreme Court or the judges of the several District Courts of the United States—and the judges of the several state courts, and the commissioners authorized so

to do by any of the Courts of the United States, are hereby severally vested with power, jurisdiction and authority, upon complaint made under oath or affirmation charging any person found within the limits of any state, district or territory with having committed within the jurisdiction of any such foreign government any of the crimes enumerated or provided for by any such treaty or convention—to issue his warrant for the apprehension of the person so charged that he may be brought before said judge or commissioner, to the end that the evidence of criminality may be heard and considered."

At the time of the passage of the act of 1848, the United States consisted of twenty-nine states. The Mississippi River being practically the western boundary of the states, as all of the most westerly states had their eastern boundaries upon the Mississippi River, with the exception, only, of Texas.

There was then, a vast territory west of the States, without any resident judges of the United States Courts, or State Judges, and United States Commissioners were appointed only in the districts, in states.

United States Commissioners are in general specially appointed, when the occasion requires, as Extradition Commissioners; and a United States Commissioner is not, *ex officio,* an Extradition Commissioner.

By the Act of 1848, there was no limitation as to the exercise of jurisdiction, by any of the judges or commissioners, to the boundaries of

any state or district, but any of them had the power and authority, *upon proper complaint made against any person found within the limits of any state, district or territory,* to issue a warrant for the apprehension of the person charged, that he might be brought before the judge or commissioner for a hearing.

Every judge or commissioner had the same powers. There was no distinction made between judges and commissioners. The commissioner were not given one whit less power or authority, in these proceedings, than the judges named in the statute. A warrant of a commissioner has the same effect and validity as a warrant of any of the judges.

The apprehension of the fugitive, for the purposes of the proceedings instituted on behalf of the foreign country, was to be obtained in any state, district or territory of the United States, so as to bring him before the judge or commissioner who had issued the warrant.

It was in furtherance of the objects of extradition treaties with foreign governments and to assist their representatives in carrying them into effect, that the complaint might be made before any of the judges or commissioners, and, upon the warrant being obtained, the fugitive could be apprehended wherever he might be found within the United States.

The decision of the Court below would have this statute limited, so that the warrant must be obtained within the state or district where the fugitive might be found.

There is nothing in the statute which warrants any such construction.

As to fugitive offenders against the laws of the United States, there is, in the statutes, a limitation as to the power of magistrates to the state "where he may be found."

If it had been the intention of Congress to make any such limitation in extradition proceedings, it would have been expressed.

These proceedings are, in general, instituted by a consul of the foreign country desiring the extradition of the fugitive. The jurisdiction of a consul extends over more than one state; there are consular districts, extending over as many as 14 different states and territories.

The complaints in these proceedings, are, in general, made before the district judge or commissioner at the place of the official residence of the consul.

Instructions as to the commencement of extradition proceedings, on behalf of Great Britain, are not all sent to one particular consul, at a particular place, but to the consul within whose consular jurisdiction the fugitive will arrive, will supposedly be found, or from which he may most easily be traced. A warrant obtained by a consul, under these circumstances, before the judge or commissioner most convenient to him, executed beyond the consular jurisdiction of the consul making the complaint, has no feature about it which tends to justify a criticism of want of fairness or disadvantage to the fugitive.

A judge or commissioner is not always at hand

in all localities of the states of the United States where a fugitive might be found, and if, after locating him, the representative had then to obtain the warrant, the ends of justice might be thwarted.

If a foreign government has first to find and locate the fugitive, in a particular district, in the United States, before a warrant is obtained for his arrest, justice may often be defeated. A fugitive may be known to be in New York, and a warrant there obtained. While the warrant is being applied for, he moves over into New Jersey. According to the decision of the Court below, a new warrant must be obtained in New Jersey. Before that warrant could be executed, the fugitive might go into the State of Pennsylvania, where a new warrant would have to be obtained, if the Court below is correct.

It is not to be overlooked that the person starts with the status of a fugitive from justice, and presumably will continue his flight until apprehended. If a foreign government should be required to obtain a warrant in every state in which the fugitive is supposed to be, it would entail upon the government such difficulties and annoyances as were never contemplated by the law or treaty.

When it was contended that in these cases, a mandate should be obtained, before proceedings for extradition could be instituted, this Court, in holding that a mandate was not necessary, said, in *Grin* v. *Shine, 187 U. S., 194:*

> "Bearing in mind the frequent necessity for immediate action in case the whereabouts of the accused is ascertained, the delay necessary

to procure a preliminary requisition, might often result in the defeat of justice."

Sec. 5270 of the Revised Statutes is substantially the same as the Act of 1848. The only noticeable difference is that "Circuit Judges" are added, and "a judge of a court of record of general jurisdiction of any State" was substituted for "the judges of the several State courts."

It had been held, before the Act of 1848, that, under the treaty of 1842, a justice of the peace was a competent magistrate.

The British Prisoners, 1 Wood & M., 66.

The first reported case, upon the right of execution of warrants in extradition proceedings, beyond the district, in which issued, seems to be *In re Philip Henrich, 5 Blatch., 415,* decided in 1867.

That was a proceeding under the treaty with Prussia.

The late Justice, Samuel Nelson, then of this Court, upon a proper complaint, had issued his warrant, directed to the marshals of the United States in any district, or to any of their deputies, commanding them and each of them to arrest Henrich, forthwith, and bring him before said Justice or Commissioner White at the City of New York, or some other Magistrate in New York, that the evidence of criminality might be heard and considered.

The warrant was placed in the hands of the Marshal of the United States for the Southern District of New York, who, by one of his deputies,

apprehended Henrich, in Wisconsin, and brought him before Commissioner White in New York.

It was claimed for Henrich that his arrest was illegal, and, after having been committed for extradition by Commissioner White, a writ of *habeas corpus* was obtained, and argument thereon had before District Judge Shipman, who disposes of the question of the arrest, as follows:

> "The first two objections to the action of the Commissioner, raised by the prisoner's counsel, rest upon the fact that he was arrested in Wisconsin, by a special deputy of the Marshal of the Southern District of New York. It is insisted that this deputy had no legal authority to execute the warrant of Mr. Justice Nelson, out of the limits of this District, and the 27th Section of the Judiciary Act of September 24th, 1789 (1 U. S. Statutes-at-Large, 87), is referred to as conclusive on this point. This section gives the Marshal no authority to execute precepts beyond the limits of his District, and it is, therefore, argued, that the deputy in this case could not lawfully execute this warrant in another District. The warrant in question was issued by Mr. Justice Nelson, and addressed to the Marshals of the United States for any District respectively, and to their deputies or the deputies of any of them, or to any of said deputies. The precept is to each and every of them, in the name of the President of the United States, to apprehend the said Philip Henrich, and forthwith bring him before the said Justice, or before the Commissioner named, or some other magistrate, at New York, &c. The operation of the warrant is not limited in terms to any

judicial District. The fugitive was not to be apprehended for any crime committed against the United States, for which he was amenable to trial in any particular District. His extradition was not sought from any District as such, but from the United States. He was to be arrested in order that he might be delivered, on good cause being shown, to the agents of the government from which he had fled. The section of the Judiciary Act referred to has no application to an arrest under an extradition treaty. No such treaty was in existence when the Act was passed, and no proceedings under such a treaty could have been contemplated by its framers. Indeed, an application of the implied restrictions of that act relating to Marshals, to warrants for the arrest of fugitives from foreign States, would make the execution of these treaties depend wholly upon the Magistrates of the District in which such fugitives might be arrested. Under such a construction, the hearing and delivery must be in the District where the arrest is made, as no Judge or Marshal could remove him to another District.

The 33rd Section of the Judiciary Act, authorizing and regulating the removal of parties arrested in one District, to be held for trial in another, clearly has no application to such a case as the present. It is claimed that the Marshal of Wisconsin should have arrested Henrich under this warrant. But he could not have performed the duty required by the warrant, under the construction of the law urged; for, if his powers under it are to be confined to his own District, then he could not have executed that part of the precept which required him to bring the accused before Mr. Justice Nelson or Commissioner

> White, at New York. Considering the object of the treaty, the provisions of the statute for carrying it into effect, by authorizing the arrest of the fugitive in any State or Territory of the United States, and the scope of Mr. Justice Nelson's warrant, I am satisfied that the arrest was legal, and that the Commissioner had jurisdiction."

In this opinion of Judge Shipman, it appears that it was rendered after a consultation with Mr. Justice Nelson, then a Justice of this Court, and the presiding Judge of the Circuit Court, in the Second Circuit, and Justice Blatchford, afterwards a Justice of this Court, whose decisions, in respect to the law of extradition, have always had great weight.

The next case reported upon this question is *Re Fergus*, 30 Fed. Rep., 607.

Fergus was arrested in State of New York by the Marshal for the District of Massachusetts, upon the District Judge's warrant, issued at Boston, and brought into the State of Massachusetts, when, there being a defect found in the warrant under which he was apprehended, a second complaint was made, and a second warrant obtained, under which he was re-arrested. No order was made upon the first complaint and warrant. The fugitive claimed that his arrest in the State of New York, under the first warrant, was illegal; that he was illegally brought within the jurisdiction of the District of Massachusetts, and that therefore the execution of the second warrant was improper; he instituted *habeas corpus* proceedings, return-

able before the Circuit Court. The opinion of the Circuit Judge is as follows:

COLT, *J.*:

> "I find no sufficient ground on which to grant this petition. The first warrant directed the marshal or his deputies to arrest the petitioner if found within their district. He was arrested by a deputy marshal on this warrant in New York State. The evidence is that, after his arrest in New York, the petitioner came voluntarily into Massachusetts. Under the form of the first warrant, there being a question whether the petitioner could be held upon it, a second warrant, was issued by the district judge upon a second complaint, and no order was made upon the first complaint and warrant. It is contended that the court had no power to issue a second warrant under the circumstances. We are here dealing with a case arising under the extradition law; and it has been held that a warrant may run throughout the United States and may be executed by any marshal or deputy marshal in any district. The fugitive is not apprehended for any crime committed against the United States, for which he is amenable to trial in any particular district. His extradition is not sought from any district as such, but from the United States. *In re* Heinrich, 5 Blatchf., 414, Spear, Extr., 254 Upon the state of facts presented in this petition, I think the court had power, under Section 5270 of Revised Statutes, to issue a second warrant."

In *Ex parte Van Hoven, 4 Dillion, 415*, the fugitive was arrested in Minnesota by a deputy marshal from the Southern District of New York, upon a warrant, issued by a commissioner in the Southern District of New York. A writ of *habeas corpus* was obtained and dismissed, and the Court directed that the accused be conveyed before the Commissioner in the Southern District of New York, who was to decide whether, according to the law and the evidence, the extradition was due, pursuant to the treaty.

The question as to the legality of the arrest, does not appear to have been raised by counsel for the fugitive, but considering the other questions submitted to the Court, if there had been any doubt about the right to arrest in Minnesota, the objection would have been made.

The cases cited, and others unreported, are referred to in Section 304 of Moore on Extradition, in support of the statement that warrants in extradition proceedings may run throughout the United States.

The State Department, in issuing mandates, where required under treaties of extradition, does not issue them to a judge or commissioner, in any particular state or district, but directs them to any justice of the Supreme Court, Circuit Judge, District Judge, &c., &c., as contained in Section 5270 of the Revised Statutes.

See various forms, in Moore on Extradition, pp. 362, 364, 365.

The mandates recite, that application has been

made by the representative of the demanding government, for the arrest of the fugitive for an extraditable crime, and that the person whose arrest is sought is a fugitive from the justice of a foreign government, *and is now within or believed to be within the jurisdiction of the United States*, and it appears proper that the said fugitive should be apprehended and the case examined in the mode provided by the Acts of Congress.

In the year 1882, an effort was made to have Sec. 5270 amended, as a result of the extradition of one Esposito, who had been arrested in New Orleans by a private detective, upon a warrant issued by a commissioner, in the Southern District of New York, and brought before the Commissioner in New York. The warrant ran

> "to any Marshal of the United States, to the Deputies of any such Marshal, or any or either of them, to any sheriff, constable or other officer, in any State, District or Territory, within the jurisdiction of the United States; to James Mooney."

Mooney was the detective who made the arrest. The defense to the proceedings was an *alibi*, and that the prisoner was not the person sought for.

Upon the hearing before the Commissioner, it was claimed that the arrest was illegal; this was overruled.

After the extradition of Esposito, his counsel called the attention of Congress to the proceedings, and notably the hardship and injustice that

could be done, in bringing a fugitive from the place where he was found, to a distant state for hearing. The matter was referred to the Committee on the Judiciary of the Senate, and a report was made January 24, 1882 (Sen. Report, No. 82, 47th Congress, 1st Session), which resulted in the passage of the Act of August 3, 1882, Chap. 378, 22 Stat. at L. 215. Section 5270 was not amended in any particular, as a result of the investigation, but as to the arrest, in these proceedings, the report reads:

> "The committee are not aware of any mode by which the difficulties set forth in the communication referred to, attending the bringing of persons accused before a jurisdiction far away from their place of residence, can be reached. The extradition exists with the United States as a whole, regardless of locality, and not with the States or in references to any section or district. The only question is, is there a sufficient complaint against a person anywhere within the United States Then the arrest is made for the purpose of an ultimate trial for the offense alleged to have been committed, regardless of the whereabouts or the mere convenience of place, of the party accused. To change the law in this regard would be to give the person sought for all the advantage against the Government with which the United States has the contract of extradition."

The right to arrest the appellant in Indiana is not only supported by the decisions cited, but the action of Congress in not amending the law, as asked for in respect to arrests, indicates that the

right to arrest under these warrants, anywhere in the United States, under Section 5270, was recognized by the lawmakers.

III.

THE FEDERAL LAW REGULATES PROCEEDINGS FOR EXTRADITION, AND STATE LAWS HAVE NO APPLICATION THERETO, EXCEPT AS NECESSARY TO DEFINE THE CRIME, AND DETERMINE WHETHER THE EVIDENCE INTRODUCED IN SUPPORT OF EXTRADITION, WOULD BE SUFFICIENT TO JUSTIFY HIS COMMITMENT FOR TRIAL, IF THE OFFENSE HAD BEEN COMMITTED WITHIN THE STATE IN WHICH HE IS FOUND.

The provisions in Article X of the treaty of 1842, that the surrender shall be "done only upon such evidence of criminality as, according to the laws of the place where the fugitive or person so charged shall be found, would justify his apprehension and commitment for trial, if the crime or offense had been there committed," is the only provision upon which state law can have any bearing.

Rice v. *Ames, 180 U. S., 371.*

In the last-cited case it was contended that the proceedings before the commissioner were governed by the law of the state of Illinois. The commissioner had adjourned the proceedings for a

period of eleven days. The laws of Illinois allowed magistrates to continue a case for a period of not exceeding ten days, and it was insisted that the commissioner, by reason of an adjournment beyond the time allowed by the state law, had lost jurisdiction of the case, as the laws of Illinois were controlling upon the proceedings before the commissioner. The Court, in respect to this contention, said:

> "By the second assignment, petitioners insist that the commissioner lost jurisdiction in the premises by continuing the proceedings from June 14 to June 25, a period of eleven days, in supposed violation of §67, article 7, of chapter 79 of the Revised Statutes of Illinois, governing continuances by justices of the peace and examining magistrates, which enacts that 'the justice before the commencement of the trial may continue the case *not exceeding ten days* at any on time on consent of the parties or on any good cause shown.' It is insisted that this statute controls proceedings before commissioners of the United States in extradition cases, by virtue of the treaty and of the several acts of Congress prescribing the duties of commissioners. The treaty only provides in Art. 6 (26 Stat. at L. 1508, 1510), that 'the extradition of fugitives under the provisions of this convention and of the said 10th article' (of the treaty of August 9, 1842) 'shall be carried out in the United States and in her Majesty's dominions respectively, in conformity with the laws regulating extradition, for the time being in force in the surrendering States.' This evidently contemplates the laws of the United States regulating extradition, and has no reference

whatever to the laws of the particular State within which the proceedings are taken.

"Provision is made by Rev. Stat., §627, for the appointment of commissioners of the Circuit Court (now called United States commissioners' act, May 28, 1896, §19, 29, Stat. at L. 140, chap. 252), who shall exercise such powers as may be conferred upon them. By Rev. Stat. §727, they are vested with such authority 'to hold to security of the peace and for good behavior in cases arising under the constitution and laws of the United States, as may be lawfully exercised by any judge or justice of the peace of the respective States in cases cognizable before them.' This evidently defines the extent of their powers, and not the mode in which such powers are to be exercised. By §1014 they are vested with the power to arrest, imprison, or bail offenders 'for any crime or offense against the United States' 'agreeably to the usual mode of process against offenders in such State,' that is, the State wherein the offender 'may be found.' That this has no application to continuances before commissioners in extradition proceedings is evident, first, by the fact that the section is confined to crimes or offenses against the United States, and, secondly, because it refers only to the usual mode of *process* against offenders in such State, and not to the incidents of the examination. To hold that the commissioner is confined in the matter of continuances to the methods prescribed for justices of the peace and other magistrates of the particular State would be utterly destructive of his power in cases arising beyond the seas, where weeks might be required to obtain the attendance of witnesses or the procure-

> ment of properly-authenticated depositions for use upon the examination. Clearly there is nothing either in the treaty or in the statutes requiring commissioners to conform to the State practice in that regard. The only requirement seems to be that arising from the 10th section of the Ashburton Treaty, that the fugitive shall only be surrendered 'upon such evidence of criminality as, according to the laws of the place where the fugitive or person so charged shall be found, would justify his apprehension and commitment for trial, if the crime or offense had there been committed.' "

In *Wright* v. *Henkel, 190 U. S., 40,* cited by the court below, there is no foundation for a claim that a hearing in these proceedings should be had in the State where the fugitive might be found. There was no such question in that case. What was determined was, that, as in the State of New York, where the fugitive was found, the offense charged was a crime, as it was also in the country from which the accused fled, the requirements of the treaty "made criminal by the laws of both countries" were fulfilled in respect of the particular offense charged; and the penal code of New York was referred to only to ascertain whether the offense charged was a crime in New York.

IV.

IN THE CASE OF A FUGITIVE CONVICT, SUCH AS THE APPELLEE, THE STATE LAW HAD NO APPLICATION, OTHER THAN TO ASCERTAIN WHETHER THE CRIME OF WHICH THE APPELLEE HAS BEEN CONVICTED WAS A CRIME WITHIN THE LAWS OF INDIANA, AND THIS COULD BE DETERMINED WITH EQUAL PROTECTION TO ALL RIGHTS OF THE APPELLEE, AS WELL IN NEW YORK AS IN INDIANA.

The appellee is not a fugitive who is charged with crime simply; he is a person who is proceeded against as one who has been convicted of the crime; the procedure therefore in his case is not regulated by the 10th article of the treaty of 1842, in so far as evidence of his criminality is concerned, that has already been established by his conviction. But by Article VII of the treaty of 1889, which, dealing specially, with persons convicted of the crimes respectively named and specified in the said Article X, whose sentence therefor shall not have been executed, prescribes the evidence upon which a fugitive shall be surrendered; that is, a record of the conviction, and of the sentence of the court before which such conviction took place, duly authenticated, together with evidence of identity. State laws have no application, for the treaty by its terms has created the character and kind of

evidence required to obtain a surrender of convicts. The provisions of the 10th article of the treaty of 1842, as to evidence of criminality, are not inconsistent with Article VII of the treaty of 1889, as it was clearly the purpose of the High Contracting parties to modify and alter the requirements of evidence as to fugitive convicts. It was never intended to require that the demanding government, under this treaty, in the case of a fugitive convict, should, before his surrender, introduce such evidence of criminality as, according to the laws of the place where the fugitive or person so charged shall be found, would justify his apprehension and commitment for trial, if the offense had been there committed, and so go through the form and requirements of a preliminary proceeding for commitment for trial, when, presumably, that had all been done in the courts in the jurisdiction of the demanding government. While it cannot be said that a fugitive, convicted of crime, is not one charged with crime, there is a distinction made in these treaties between the person charged, simply, and one who has been convicted. The conviction is conclusive evidence of criminality, and intended by the treaty to be made so, and no further evidence of criminality was to be required or needed, as the criminality is established by a duly authenticated copy of the record of conviction, and the sentence of the court before which the conviction took place. The only other evidence that was required was that of the identity of the fugitive as the person referred to in the conviction. Local or State laws, as to evi-

dence, have no application, therefore, in the cases of fugitive convicts. Whatever might be said in support of the decision of the Circuit Court, in respect to a person who had not been convicted of crime, and who was entitled to a hearing, and to have the evidence of criminality determined by the law of the place where he was found, can have no force in the case of a fugitive convict, under the treaty; for the treaty of 1889 has, in respect to fugitive convicts, avoided the requirements of evidence of criminality contained in the treaty of 1842.

If there is any conflict or inconsistency between Article X of the treaty of 1842, and Article VII of the treaty of 1889, the latter will control; being, in effect, a later law, it supersedes the earlier treaty.

Head Money cases, 112 U. S., 580.
Whitney v. *Robertson, 124 id., 190.*
Horner v. *United States, 143 id., 570.*
Chinese Exclusion cases, 130 id., 581.

Treaties for extradition are to be liberally construed, for the purpose of carrying their object into effect.

Grin v. *Shine, 187 U. S. R., 191.*
Tucker v. *Alexandroff, 183 U. S., 424.*

An alien convict has no right of asylum or habitation anywhere in the United States under our immigration laws, and can acquire no local residence.

Grin v. *Shin, supra.*

V.

IT IS RESPECTFULLY SUBMITTED THAT THE ORDER APPEALED FROM SHOULD BE REVERSED.

CHARLES FOX,
Of Counsel for H. B. M. Consul-
General, at New York,
Appellant.